STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 5, 2011
v	No. 296183 Genesee Circuit Court
ISADORE NIGEL DEAN, Defendant-Appellant.	LC No. 09-025483-FC

Before: SERVITTO, P.J., and HOEKSTRA and OWENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316, felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, two counts of discharge of a firearm at a building, MCL 750.234b, two counts of discharge of a firearm from a motor vehicle, MCL 750.234a, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of life imprisonment for the murder conviction, 22 to 60 months for the felon in possession conviction, 30 to 60 months for the CCW conviction, and 18 to 48 months, each, for the discharge of a firearm at a building and discharge of a firearm from a vehicle convictions, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the May 19, 2009, shooting death of Donnell Ellison at the Street Riders Motorcycle Club in Flint. The evidence at trial indicated that, before the shooting, defendant was involved in a fight with a non-member of the club, that he was removed from the club, and that he angrily stated that he would be back. According to witnesses, defendant later returned to the club driving a Cavalier automobile, drove past the club twice, and fired gunshots toward the club both times. The victim was fatally shot in the back during the second pass. The principal evidence against defendant was the testimony of three eyewitnesses who identified defendant as the shooter and the person who had earlier been removed from the club for fighting. Defendant presented an alibi defense through his testimony and the testimony of his girlfriend.

I. NEWLY DISCOVERED EVIDENCE

On appeal, defendant first argues that the trial court erred by denying his motion for a new trial based on the newly discovered evidence of his girlfriend's car. Defendant argues that

because the trial testimony indicated that the shooter drove a silver or gray Chevrolet Cavalier, newly discovered evidence that the Cavalier that his girlfriend formerly owned was gold is crucial evidence. This Court reviews a trial court's decision on a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). A trial court's factual findings are reviewed for clear error. *Cress*, 468 Mich at 691; MCR 2.613(C).

In justifying a new trial on the basis of newly discovered evidence, a defendant must demonstrate that: (1) the evidence itself, not merely its materiality, is newly discovered; (2) the newly discovered evidence is not merely cumulative; (3) the defendant, exercising reasonable diligence, could not have discovered and produced the evidence at trial; and, (4) the new evidence makes a different result probable on retrial. *Cress*, 468 Mich at 692. Defendant has not established any of these requirements.

First, the evidence (i.e., the car itself) could have been discovered before and produced at trial with due diligence. Defendant claimed that he was unaware of the location of the car, but it had belonged to his girlfriend, who was also his alibi witness. According to his girlfriend's testimony, her Cavalier had been broken down outside her mother's house until she put it into someone else's name shortly after the shooting. Given defendant's relationship with the car owner, defendant was in a position to "discover" the car with due diligence. The fact that defendant's attorney was able to determine the location of the vehicle within "a few days" supports this conclusion. Further, the crucial reason that defendant sought to introduce the vehicle was to establish its actual color, i.e., to show that it was gold and not silver. To that extent, the evidence would have been cumulative of other evidence presented at trial. Evidence was presented at trial that, consistent with the vehicle's identification number, the color of the vehicle was "sand drift metallic." A paint sample of that actual color was presented to the jury, and a Chevrolet body shop manager testified regarding the color's appearance.

Moreover, as the trial court observed, the new evidence is not such as to render a different trial outcome probable. The exact metallic color of the Cavalier was not the crucial evidence against defendant. Rather, three witnesses testified that they were certain that defendant was the shooter. The three eyewitnesses, and two additional witnesses, also testified that defendant had earlier angrily declared that he would return to the club. The fact that two eyewitnesses described the color of the shooter's car as silver or gray is not remarkable given the body shop manager's testimony that the "light color metallic" can appear more silvery or metallic with light shining on it. Also, one eyewitness actually described the shooter's Cavalier as "like a silver or a *tan*." Indeed, the fact that defendant's girlfriend owned a metallic-colored Cavalier that could appear silver in certain lighting is far more inculpatory than defendant's claimed exculpatory value of the evidence. In addition, the fact that defendant's girlfriend and alibi witness decided to remove her name from the Cavalier only a few days after the shooting further supports the inculpatory value of the "new" evidence. Consequently, the trial court's decision to deny defendant's motion for a new trial was within the range of reasonable and principled outcomes and, therefore, was not an abuse of discretion. *Yost*, 278 Mich App at 379.

Defendant alternatively argues that defense counsel was ineffective for failing to request an adjournment for the purpose of locating the vehicle. Because defendant did not raise an

ineffective assistance of counsel claim in the trial court, our review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that the result of the proceeding would have been different but for counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Defendant has not established these requirements.

Defendant's sole specific claim of prejudice is that the jury was not able to view his girlfriend's Cavalier to inspect its color. As previously discussed, however, the color of defendant's girlfriend's car was able to be determined from the vehicle identification number, and a paint sample of that color was presented to the jury. Defendant does not contend that the sample did not accurately depict the color of his girlfriend's car. Because there was an alternative means of allowing the jury to view the color of the car, defense counsel's failure to request an adjournment for an opportunity to locate the car was neither objectively unreasonable nor prejudicial. Consequently, defense counsel was not ineffective in this regard.

II. REPLACEMENT JUROR

Next, defendant argues that the trial court abused its discretion when it replaced a sitting juror with an alternate juror after deliberations had begun. We disagree. This Court reviews a trial court's decision to replace a deliberating juror with an alternate juror for an abuse of discretion. *People v Tate*, 244 Mich App 553, 562; 624 NW2d 524 (2001).

On the second day of deliberations, the jury sent a note indicating that it had a mixed vote and could not reach a verdict. The trial court provided the jury with the "deadlocked jury" instruction and the jury continued deliberations. The jury later sent another note indicating that a juror was scared because she lived and worked near defendant. The trial court questioned the juror about her reluctance to participate in the deliberations. The court also permitted the attorneys to question the juror. The juror indicated that she was afraid to participate in the deliberations and return a verdict because defendant's residence was near her residence and place of employment. After hearing argument from the parties, the court ordered deliberations to continue with an alternate juror, and instructed the jurors to begin their deliberations anew with the alternate juror.

MCL 768.18 provides, in pertinent part:

> Should any condition arise during the trial of the cause which in the opinion of the trial court justifies the excusal of any of the jurors so impaneled from further service, he may do so and the trial shall proceed, unless the number of jurors be reduced to less than 12.

MCR 6.411 provides:

> The court may impanel more than 12 jurors. If more than the number of jurors required to decide the case are left on the jury before deliberations are to

> begin, the names of the jurors must be placed in a container and names drawn from it to reduce the number of jurors to the number required to decide the case. The court may retain the alternate jurors during deliberations. If the court does so, it shall instruct the alternate jurors not to discuss the case with any other person until the jury completes its deliberations and is discharged. If an alternate juror replaces a juror after the jury retires to consider its verdict, the court shall instruct the jury to begin its deliberations anew.

"[W]hile a defendant has a fundamental interest in retaining the composition of the jury as originally chosen, he has an equally fundamental right to have a fair and impartial jury made up of persons able and willing to cooperate, a right that is protected by removing a juror unable or unwilling to cooperate." *Tate*, 244 Mich App at 562.

The trial court did not abuse its discretion in this regard. First, there was a permissible reason to replace the juror during deliberations. The trial court conducted a hearing to determine the juror's claimed fears and refusal to deliberate. The attorneys had the opportunity to question the juror. The juror stated that she was unwilling to deliberate because she was afraid and uncomfortable, and feared retribution to her and her family because she lived and worked near defendant's residence. The nature and source of the juror's fears and difficulties were personal to her, and unrelated to her relationship with fellow jurors or her views of the case. The trial court, in formulating its decision to replace the sitting juror, recognized the difficulty related by the juror, who alleged under oath that personal reasons were the basis for her inability or unwillingness to deliberate, and that the solution was to replace the sitting juror with an available alternate as permitted by the court rules. The trial court protected defendant's right to a fair and impartial jury by "by removing a juror unable or *unwilling* to cooperate." *Tate*, 244 Mich App at 562 (emphasis added). The trial court also specifically instructed the jury, as it was required to do under MCR 6.411, to begin its deliberations anew when joined by the alternate juror. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Aside from defendant's speculation that the jury was tainted by the dismissed juror, there is no evidence to support that argument, or that the jury disregarded its instructions to begin its deliberations anew. Further, because there is no evidence that the jury was tainted by the dismissed juror, defendant's argument that he is entitled to an evidentiary hearing pursuant to *Remmer v United States*, 347 US 227, 229; 74 S Ct 450; 98 L Ed 654 (1954), is misplaced. The trial court's handling of the situation and decision to replace the sitting juror with an alternate was within the range of reasonable and principled outcomes and, therefore, was not an abuse of discretion. *Yost*, 278 Mich App at 379.

III. RIGHT TO A PUBLIC TRIAL

Defendant next argues that his right to a public trial was violated when the trial court closed the courtroom to the public during jury selection. Defendant did not object to the partial closure at trial.

A criminal defendant has a constitutional right to a public trial, US Const, Am VI; Const 1963, art 1, § 20, and that right extends to jury selection. *Presley v Georgia*, 558 US ___; 130 S

Ct 721, 724-725; 175 L Ed 2d 675, 681 (2010). However, a defendant may relinquish his right to a public trial by failing to object to the trial court's decision to close the courtroom to the public during jury selection. *Levine v United States*, 362 US 610, 619; 80 S Ct 1038; 4 L Ed 2d 989 (1960); *United States v Hitt*, 473 F3d 146, 155 (CA 5, 2006). Recently, in *People v Vaughn*, ___ Mich App ___; ___ NW2d ___ (Docket No. 292385, issued December 28, 2010), slip op at 6-7, this Court rejected a defendant's claim that reversal was required where, as in this case, the trial court closed the courtroom to the public during jury voir dire without objection by the defendant. This Court stated that "the failure to timely assert the right to a public trial forecloses the later grant of relief," and held that because the "defendant's trial counsel did not object to the trial court's decision to close the courtroom to the public during the selection of his jury[,] . . . the error does not warrant relief."

In this case, the trial court stated the following just before jury selection:

> [A]t this point, we're ready to get the jury up here. All of you that are in the audience, you are going to have to stand out in the hallway while we're selecting the jury. Really, my best advice to you would probably be just to go home until tomorrow because my guess is that we're not going to get the jury selected probably not even today, it will probably take us into tomorrow to get the jury selected. And until the jury is selected, you won't be allowed in the courtroom. But, once we get the jury selected, then you'll be allowed to come back in the courtroom and to watch the proceedings.
>
> So if I were you, I would probably just go home the rest of the day and come back tomorrow morning and see where we are at that time. Okay? Because you would definitely be in the hallway the rest of today at least. Okay? All right, with that I'm going to ask you all to leave, if you don't mind please?

Like the defendant in *Vaughn*, defendant here, with knowledge of the closure of the courtroom, failed to object. Therefore, the error does not warrant relief. *Id.*

We reject defendant's alternative argument that a new trial is required because defense counsel was ineffective for failing to object to the closure of the courtroom during jury selection. The public trial right benefits a defendant by ensuring a fair trial, ensuring that the judge and prosecutor carry out their duties responsibly, discouraging perjury, and encouraging witnesses to come forward. See *Waller v Georgia*, 467 US 39, 46; 104 S Ct 2210; 81 L Ed 2d 31 (1984). Defendant does not contend, and there is no indication, that any of these values were jeopardized in this case. Accordingly, defendant has failed to establish that defense counsel was ineffective in this regard.

IV. FAMILY PHOTOGRAPH

Defendant next argues that the trial court abused its discretion by admitting a photograph of the victim with his family. Although we agree that the photograph was not relevant, its admission does not entitle defendant to a new trial.

The decision to admit photographic evidence is within the sole discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Mills*, 450 Mich

61, 76; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995); *People v Ho*, 231 Mich App 178, 187; 585 NW2d 357 (1998). Where evidence is improperly admitted, the defendant bears the burden of establishing that the evidentiary error resulted in a miscarriage of justice. MCL 769.26 and *People v Lukity*, 460 Mich 484, 493; 596 NW2d 607 (1999).

Photographs that are calculated solely to arouse the sympathies and prejudices of the jury may not be admitted. *People v Howard*, 226 Mich App 528, 549; 575 NW2d 16 (1997). The question is whether a photograph is relevant under MRE 401 and, if so, whether its probative value is substantially outweighed by the danger of unfair prejudice under MRE 403. *Mills*, 450 Mich at 67-68. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *Yost*, 278 Mich App at 355. Thus, "evidence is admissible if it is helpful in throwing light on any material point." *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001).

We find merit to defendant's claim that the victim's family photograph was not relevant to any material point in this case. Plaintiff argues that the family photograph was relevant because it shows that the victim "was alive before he was murdered," and "depicts a close family." That the victim was previously living was not in question, however, and the closeness of the victim's family did not make it more or less probable that defendant was guilty. Plaintiff does not indicate any other reason that the photograph was helpful in this case. Thus, the trial court abused its discretion in admitting it. However, defendant has not carried his burden of establishing that the error resulted in a miscarriage of justice. MCL 769.26; *Lukity*, 460 Mich at 495-496. To justify reversal, the defendant must establish that it is more probable than not that the error was outcome determinative. *Id.*

The evidence of the family photograph was not particularly prejudicial considering that the victim's wife testified about the victim and their children. Further, the trial court instructed the jury, both before it viewed the photograph and again in its final instructions, that the jury should not be influenced by sympathy, prejudice, or bias. Moreover, as previously indicated, three eyewitnesses identified defendant as the shooter, and other witnesses testified that they heard defendant announce his intent to return to the club shortly before the shooting. The evidence supporting defendant's alibi defense consisted of defendant's own testimony and the testimony of defendant's girlfriend, which was discredited to the extent that defendant admitted that that he did not tell the police that he was with his girlfriend at the time of the shooting. After examining the nature of the evidentiary error in light of the trial court's cautionary instructions and the weight and strength of the untainted evidence, it is not more probable than not that error affected the outcome. Accordingly, reversal is not required.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant lastly argues that defense counsel was ineffective for failing to "make a proper objection" to the trial court replacing a sitting juror with an alternate juror. We disagree.

As discussed in section II, *supra*, the trial court's decision to replace the deliberating juror with an alternate juror was not improper. Nevertheless, defense counsel argued against the replacement and requested instead that the trial court declare a mistrial. It is evident from

counsel's arguments at trial that he was familiar with this issue. Defendant does not indicate what additional arguments defense counsel should have made. To the extent defendant relies on the fact that defense counsel's argument was not successful, nothing in the record suggests that defense counsel's presentation of the argument was unreasonable or prejudicial. Decisions about how to argue an issue are a matter of trial strategy, and "[t]his Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Further, the mere fact that defense counsel's argument was unsuccessful does not constitute ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). We therefore reject this claim of error.

Affirmed.

/s/ Deborah A. Servitto
/s/ Joel P. Hoekstra
/s/ Donald S. Owens